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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

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Respondents appear to agree that the petitions in these cases present an important question, one that has in fact been raised by a majority of the Members of this Court: whether *Aguilar v. Felton*, 473 U.S. 402 (1985), should be overruled. Respondents argue, however, that the parties most directly affected by that decision cannot raise the question — either because they are the wrong parties to do so, or because there is something inadequate about the record that they bring to this Court. These procedural objections are insubstantial.

ARGUMENT

I. RESPONDENTS OFFER NO REASON WHY *AGUILAR* v. *FELTON* SHOULD NOT BE OVERRULED.

The most striking feature of the Respondents' Brief in Opposition is that it makes no attempt to defend the reasoning in *Aguilar v. Felton*, 473 U.S. 402 (1985) — that the monitoring of Title I teachers on the premises of church-related schools "inevitably results in the excessive entanglement of Church and State." *Id.* at 409. Respondents do not argue that the "excessive entanglement" prong of *Lemon* has any continuing vitality, much less that it was correctly applied in *Aguilar*. Implicitly, they recognize that *Aguilar* cannot stand on the terms on which it was decided.

Respondents argue, however, that there are "credible grounds other than, or in addition to, the doctrine of 'excessive entanglement' on the basis of which this Court *might* let its determination in *Aguilar* stand." Respondents' Brief in Opposition ("Br. Opp.") 21 (emphasis added). Petitioners agree that is a question worthy of the Court's attention, but the answer is supplied by the cases discussed in Section I.B. of the Petition. Those cases establish that the Establishment Clause is not offended when a limited form of secular instruction is provided on an equal basis to all eligible students, regardless of their religion and regardless of where they attend school. Establishment Clause problems may arise when "direct grants of government aid . . . relieve[] sectarian schools of costs they otherwise would have borne in educating their students," or when a government program "in effect subsidizes the religious functions of the parochial schools by taking over a

substantial portion of their responsibility for teaching secular subjects." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993). But that is not the case here. No funds or materials are provided directly to the schools, and by providing limited remedial instruction to a small fraction of the students in a particular school the government can hardly be said to be "taking over a substantial portion of [the schools'] responsibility for teaching secular subjects." *Id.*

II. THIS CASE PRESENTS A FULLY DEVELOPED RECORD AND A GENUINE CONTROVERSY.

Respondents suggest that the record is somehow inadequate to permit the Court to address the "other" grounds upon which the Court "might" let *Aguilar* stand. Br. Opp. 21. But the respondents have had two opportunities to develop the record: first, when the original record in *Aguilar* was created; and second, when the Rule 60(b) motions were filed in the district court. Both sides submitted whatever factual information they thought was relevant before the initial decision, and both sides submitted additional material to the district court in support of, or opposition to, the Rule 60(b) motion. The record was fully adequate to decide the case in 1985, and the supplemental record is fully adequate today.

Respondents raise only two questions about the record. First, they question whether Title I services in fact "supplant" instruction that was provided by the church-related schools. If that were the case, Title I itself would be violated. See 20 U.S.C. § 6322(b); 34 C.F.R. § 200.12(a). But the record establishes beyond dispute that it is not the case. The original record in *Aguilar* contained affidavits from the responsible educational officials of the Archdiocese of New York and the Diocese of Brooklyn, and the Rule

60(b) motions were supported by supplemental affidavits from those officials. Those affidavits made clear that the Catholic schools in New York and Brooklyn did not offer the types of services that are available under Title I, and that Title I did not replace any of those schools' educational offerings.¹ That evidence has never been controverted.

Second, respondents suggest that the Title I program has changed since *Aguilar* was decided, and that the program will never be reinstituted in its original form even if *Aguilar* is overruled. These suggestions are baseless, as the record clearly shows. The City submitted a lengthy affidavit with its Rule 60(b) motion. That affidavit stated that "the basic educational composition of [Title I] services for private school students, as provided by the Board of Education, has remained essentially unchanged, from [Title I's] inception in 1965 until today." Declaration of Margaret O. Weiss ¶ 12 (Oct. 16, 1996). Those services consist of remedial instruction and clinical and guidance and support services, which are made available only to students who meet the statutory eligibility requirements. *Id.* ¶¶ 12-13. The only change that has taken place, the City's affidavit made clear, was that as a result of the decision in *Aguilar* services are no longer provided on the premises of church-related schools. *Id.* ¶ 15. The affidavit proceeds to describe the alternative methods that were adopted, and to explain why the City sought to return to "the in-school delivery of [Title I] services which was used for private school students prior to the judgment" in *Aguilar*. *Id.* ¶ 78. In short, the record is clear that the City, joined by the defendant-intervenors and

¹ See Affidavit of Reverend Vincent D. Breen (May 30, 1995) ¶ 6 (attaching Affidavit of Reverend Vincent D. Breen (March 22, 1979) ¶ 6); Affidavit of Catherine Hickey (May 31, 1995) ¶ 6 (attaching Affidavit of Reverend Monsignor John J. Healy (March 22, 1979) ¶ 6.

now by the federal government, seeks to be relieved from the judgment precisely so that it can reintroduce the same on-premises services that were at issue in *Aguilar*.

Respondents raise the specter of new *schoolwide* programs' being offered for the benefit of all students in a religious school, presumably in place of the programs that are presently being offered to a limited number of eligible students. But that is a red herring. Department of Education policy expressly provides that "schoolwide programs may not be operated in private schools." Title I, Part A, Policy Guidance, U.S. Department of Education (April 1996) 13.² That policy is consistent with the Title I regulations, which provide that Title I funds may not be used to meet the "needs of the private school." 34 C.F.R. § 200.12(b). Thus, there is no issue of schoolwide programs in this case. This case concerns only the provision of limited remedial and counseling services to schoolchildren who meet the statutory eligibility criteria of economic and educational deprivation.

Respondents also imply that the Board may decide in the future to change the method of Title instruction from the present "pull-out" method, in which students are pulled out of their regular class for remedial instruction, to a "push-in" method, in which the Title I teacher joins the regular classroom teacher in providing instruction to the entire class. This is another red herring. There is nothing in the record to suggest that the "push-in" method is being contemplated for use in the nonpublic schools. The affidavit to which

² There is nothing new about the statutory authorization of schoolwide programs. It has been in existence since 1978, long before *Aguilar* was decided. See Pub. L. No. 95-561, § 133, 92 Stat. 2176. But schoolwide programs have never been authorized in nonpublic schools.

respondents cite was submitted in another case to explain how services are provided in some *public* schools. There has never been a suggestion that the "push-in" method might be offered in the nonpublic schools, and there is certainly no such issue before the Court.

In sum, there is no uncertainty about the nature of the services that the Board proposes to offer — or the setting in which they will be offered — if relief is granted from the injunction under which the Board now operates. All of the petitioners, joined now by the federal government, seek relief from the judgment precisely so that the same remedial and counseling services that were at issue in *Aguilar* may be offered in the same on-premises setting in which they were offered prior to *Aguilar*.

It is astonishing that respondents could seriously maintain that the dispute over whether that relief should be granted is "academic," and that there is no "real dispute that depend[s] upon the determination in *Aguilar*." Br. Opp. 13. Nothing could be further from the truth. As a direct result of "the determination in *Aguilar*," *id.*, there is a continuing injunction in effect that prevents the government defendants from providing services to the intervenor-defendants' children under the conditions that all the defendants maintain are most efficient and beneficial. As the affidavit submitted by the City of New York in support of its Rule 60(b) motion makes clear, it is only because of this continuing injunction that Title I services are not offered on the premises of church-related schools in New York City. The dispute is a very real one, the contours of which are clearly defined by the record in this case.

III. THERE IS NOTHING UNUSUAL OR IMPROPER ABOUT THE PROCEDURE BY WHICH THE PETITIONERS SOUGHT RELIEF FROM THE JUDGMENT.

In their Cross-Petition and Part I of their Brief in Opposition, respondents insist that the law affords no procedure by which the parties in *Aguilar* can seek relief from the judgment, no matter how inconsistent that judgment may be with subsequent pronouncements of this Court and no matter how burdensome the judgment has become. Respondents maintain that the parties are "stuck" with *Aguilar* and its continuing effects until *someone else* persuades the Court in a *different* case that *Aguilar* should be overruled. But if reconsideration of *Aguilar* is warranted by subsequent developments in the law, then surely the parties who are subject to the continuing injunction mandated by *Aguilar* are appropriate parties to seek it. They cannot do so through a separate suit for a declaratory judgment: absent a modification of the judgment in this case, the principle of *res judicata* would bar a separate suit. These parties, therefore, have no choice but to seek a modification of the judgment if they wish to be relieved of its burdens.

There is no question that the federal courts have power to grant the requested relief. The federal courts have inherent power, reinforced by Rule 60(b), to entertain a request that a continuing injunction should be modified or vacated. See, e.g., *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

The available grounds for such relief include that "it is no longer equitable that the judgment should have prospective application" or "any other reason justifying relief from the operation of the judgment." These grounds

necessarily include a meritorious argument that the law has been changed or that, in light of other developments, it should be changed. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992); *System Federation No. 91 v. Wright*, 364 U.S. 642, 647, 650 n.6 (1961).

In this case, the grounds for relief are not simply that the law should be changed, but that the law in material respects has changed. In particular, as explained in the petition, the "excessive entanglement" prong upon which *Aguilar* was based appears to have been abandoned, and the principle of neutrality has since been applied in a way that appears to foreclose any other rationale for the result in *Aguilar*. In short, *Aguilar* itself has not been overruled — any more than any judgment that is the subject of a Rule 60(b) motion has been vacated before the motion is made — but the legal principles upon which it rests have been changed. And that is a classic basis upon which to seek relief from a judgment.

That this case was decided last time at the Supreme Court level does not deprive the parties of the right they would otherwise have to seek relief from a continuing injunction. In *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), this Court expressly held that a district court may entertain a Rule 60(b) motion to vacate an injunction that had been previously affirmed by this Court. In that case, the Court expressly abandoned the requirement, which it had previously imposed, that appellate leave be obtained before a district court can reopen a case previously decided by this Court.

Whatever court decided the case on the merits eleven years ago, the parties have the ability under extraordinary circumstances to seek relief from its continuing effect. And

when a majority of this Court has indicated that the decision may have been wrong and should be reconsidered, it would be strange indeed to say that the parties whose actions are restrained by that decision cannot secure the reconsideration that has been invited.

To be sure, the district court may have been constrained to deny the Rule 60(b) motion in the absence of a decision by this Court explicitly overruling *Aguilar*. But that is no impediment to this Court's granting the petition and entertaining the argument on the merits that *Aguilar* should be overruled. Anytime a litigant sets out to secure the explicit overruling of one of this Court's precedents, the district court and the court of appeals may feel restrained by precedent to rule against him.³ But then this Court can decide whether the time has come to revisit the precedent and overrule it. To be sure, principles of *stare decisis* or, in this case, law of the case may constrain even this Court. But neither of these principles is absolute,⁴ and both must

³ Thus, if someone other than a party to this case were to question the continued vitality of *Aguilar*, he would face essentially the same barrier that these parties face. The district court and the court of appeals would almost certainly feel bound by *Aguilar* as a precedent, just as much as the courts below felt bound.

⁴ There is nothing about the law-of-the-case doctrine that precludes relief in this case. "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). Law of the case is "not an inviolate rule" and "merely expresses the general practice of refusing to reopen what has been decided." *United States v. Melendez-Carrion*, 820 F.2d 56, 60 n.1 (2d Cir. 1987). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *DiLaura v. Power Authority*, 982 F.2d 73, 76 (2d Cir. 1992) (quotation and citations omitted).

necessarily accommodate intervening decisions and doctrinal developments that cast doubt on the earlier decision.

Granting the petition and entertaining the request for reconsideration of *Aguilar* would not open the floodgates to repetitive requests for reconsideration of the Court's decisions. It is an extraordinary case in which the correctness of a continuing injunction has been called into question by a majority of this Court, and entertaining a petition in such a case will hardly encourage other litigants to file insubstantial Rule 60(b) motions and seek review upon their denial. If it does, this Court has previously expressed its "confidence in the ability of the district courts to recognize frivolous rule 60(b) motions." *Standard Oil Co. v. United States*, 429 U.S. at 19.

In sum, there is no reason why this Court cannot or should not reconsider its decision in *Aguilar* in this, the same case. The question, petitioners respectfully submit, is how the Court, a majority of whose members have invited *Aguilar's* reconsideration, can avoid reconsidering it when the parties most directly affected by the decision are properly before the Court requesting reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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